United States Department of Labor
Employees' Compensation Appeals Board

S.T., Appellant	)	
and	)	**Docket No. 08-37**
	)	**Issued: May 2, 2008**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Dallas, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 2, 2007 appellant filed a timely appeal from the November 28, 2006 and August 2, 2007 merit decisions of the Office of Workers' Compensation Programs, which denied his claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether appellant sustained an injury in the course of employment on October 3, 2006.

FACTUAL HISTORY

On October 11, 2006 appellant, then a 60-year-old Bank Security Act examiner, filed a claim alleging that he sustained a whiplash injury on October 3, 2006: "Someone hit my car in

the back very hard." Norma J. Etherington, appellant's supervisor, stated that she called appellant on October 5, 2006 to arrange a meeting the following day:

> "During that [tele]phone contact, [appellant] stated to me that he had been involved in an auto[mobile] accident on [October 3, 2006]. I informed him that he should have informed me on [October 3, 2006] that he had been involved in an auto[mobile] accident and had failed to do so. [Appellant] described the accident as follows: He was leaving an audit site to return to his Post-of-Duty (POD). While exiting Interstate 35 onto Highway 75, his vehicle was rear-ended while traveling on the ramp.… [Appellant] stated that he exchanged information with the other driver, which included driver's license info[rmation] and insurance info[rmation]. He stated that he waited for 1½ hours for the police to arrive. The other driver did not want to wait 1½ hours for the police to arrive, so that driver left. According to [appellant], [he] told the police that he was not hurt, so the police did not prepare a police report at the accident site. [He] was given a small slip of paper with a number on it for an incident."

Ms. Etherington stated that appellant failed to notify the Group Manager on October 3, 2006: "Employee called Group Secretary on [October 3, 2006] to record four hours of annual leave for [October 3, 2006], but made no comments to Group Secretary regarding any auto[mobile] accident during the [tele]phone call." She later explained that the Group Secretary did not learn of the accident until October 6, 2006.

A Dallas Police miscellaneous incident report showed that appellant was involved in a minor accident on October 3, 2006 about 10:25 a.m. The location of the incident was given as 900 McKinney. The officer reported no injuries.

On November 3, 2006 appellant wrote: "The incident occurred during the time of course of employment. I was driving back to the Downtown Dallas office to check my email, after completing my job in Duncanville, TX." The employing establishment submitted map information to show that the location of the incident was not en route to appellant's post of duty. The employing establishment stated that appellant had diverted from the recommended route of travel from the examination site to the downtown office when the accident occurred.

In a decision dated November 28, 2006, the Office denied appellant's claim for compensation. The Office found that the medical evidence did not establish that the claimed medical condition was related to the accident.

Appellant requested an oral hearing before an Office hearing representative. He submitted a May 7, 2007 treatment note from Dr. Maria A. Tumage, an orthopedic surgeon, who diagnosed multilevel mild lumbar degenerative disc disease and spondylosis with pain beginning after a motor vehicle accident on October 3, 2006. Dr. Tumage stated it was likely the degenerative changes were aggravated by his accident. Appellant also submitted a statement that on October 3, 2006, after he finished doing Title 31 work in Duncanville, Texas, he was driving back to the office in downtown Dallas when his car was struck from behind.

At a hearing on June 1, 2007, appellant testified that on the morning of the accident he left his home in Plano, Texas, and took highway 75 to Duncanville to keep an appointment with a convenience store owner. He left the appointment about 9:30 or 9:45 a.m. to go to the downtown office on Commerce Street to check his e-mail. Appellant stated:

> "Why I'm going downtown, because Miss Norma said that you have to go to -- oh, you don't read e-mail after hours. Norma, I've been for 20 years. We got kind of -- we call this -- we can open Internet, we can't take the computer home, and after hours we can read the e-mail, we do work, whatever. We have access to our e-mail and Internet and all this. And that's fine. She said no, don't do this, you have to do it during the time from 7 to 3:30. Fine. So after I finished I said it's very easy so I said okay, go downtown. I exit."

Appellant then explained how the accident occurred:

> "From 75 when I go downtown, I exit McKinney exit and the first one is whatever the -- and I miss it. I went to McKinney and this guy, old man very hard and very quick and very fast he drive very fast, he pushed me very bad in the back. I said what is it, what is it. I don't know, I'm sorry, I don't have any accident before, never. Let's go now to this exit and stay here to call the police. So I went over there, my leg is hurting me and I call the police and the lady, she said sir, we have robbers, somebody robbed the bank here in Dallas and you have to wait."

The hearing representative told appellant that she drove that direction to go to work every day and it usually did not take her more than 10 or 15 minutes to get from the audit area to downtown. The hearing representative also noted that taking highway 75 to get to Commerce Street off of Interstate was not the most direct route. Asked why he did not take a shorter route, appellant stated: "Yeah, it is because I left Commerce, there is two exits, one Commerce, the other one 75 exit McKinney, and I just -- I don't know. Just because I drive very slow, I missed the Commerce and I left the other one, the McKinney and tried to go downtown so I can take my lunch in McDonald's. So what? It's not big deal." When the hearing representative noted that appellant worked on Commerce Street, so it did not make sense for him not to take the Commerce exit, he replied: "I don't know really that day, maybe I'm going to take -- because I went to take lunch before I go to downtown so it's not big deal really. It's not…." He added: "We took lunch at 11:00." The hearing representative observed that appellant had not previously mentioned that he was going to take lunch. Appellant replied: "No, no, because you insisted that is not my route like Norma said. That's my route. This is not big deal. It's not exit anything, so what exit from this street, from this street. I go downtown before I go to Commerce. So what? Take break and lunch, whatever. It is early."

Appellant testified that he called his secretary after the accident and told her he was taking four hours of annual leave. However, he also noted that he may have left a message, he was not sure: "Her name is Miss whatever. And anyway, I told her Miss, I'm going to take four hours annual leave because I got car accident and that's it, and I went home…." He stated that he also called Ms. Etherington, but she was not at her desk.

In a decision dated August 2, 2007, the hearing representative affirmed the denial of appellant's claim. She found that appellant failed to establish the factual component of "fact of injury" due to several contradictions and discrepancies in his claim, including the location of the accident and his activity at the time of the accident. Considering the maps of the area in relationship to the claimant's home and his work site, the hearing representative found credible the employing establishment's contention that appellant was en route to his home when the injury occurred. The hearing representative noted that appellant's account of notifying the group secretary when he called to request leave on October 3, 2006 was contradicted. She noted that there was a discrepancy regarding whether appellant sustained any physical injury as a result of the car accident. Although appellant denied any prior disability, he had a prior car accident in 2005, was hospitalized for five months with injuries to his neck and legs and had received physical therapy shortly before the October 3, 2006 accident. The hearing representative stated: "The claimant discounted the discrepancies in his claim, and stated they were no big deal, however, unexplained discrepancies and contradictions cast serious doubt on the fact of injury in this claim."

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[1] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of performance."[2] To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his employer's business, at a place where he may reasonably be expected to be in connection with his employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto.[3]

A claimant seeking compensation under the Act has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence.[4] When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged.[5] To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. In determining whether a *prima facie* case has been established, such circumstances as late

[1] 5 U.S.C. § 8102(a).

[2] This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

[3] *See Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp (Joseph L. Barenkamp)*, 5 ECAB 228 (1952).

[4] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[5] *See generally John J. Carlone*, 41 ECAB 354 (1989).

notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast sufficient doubt on a claimant's statements. The employee has not met his burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[6]

ANALYSIS

Appellant alleged on October 3, 2006 when his automobile was struck by another car. However, he has not given a clear and consistent account of how the October 3, 2006 accident occurred. There is some discrepancy as to the element of time. Appellant testified that he left his appointment with the convenience store owner in Duncanville about 9:30 or 9:45 a.m. to go to the downtown Dallas office on Commerce Street. The hearing representative noted, however, that this would take only 10 or 15 minutes and with the accident occurring at 10:25 a.m., it seemed there was about a half-hour period unaccounted for. Appellant could not explain: "No -- yeah, half-hour, maybe I stay on the road sometimes along the way, but so what?"

There is also a discrepancy as to the element of place. From appellant's account, the incident occurred on the ramp from Interstate 35E north to US Route 75. There is no ramp directly to US 75. Appellant perhaps meant Exit 429A to the Woodall Rodgers Freeway East, the state route that connects I-35E north to US 75. But this is not a place where appellant may reasonably be expected to be in connection with his employment. Not only is this beyond the Commerce Street exit to his post of duty, it is the path he would travel if he were returning home to Plano on US 75.[7] The Office hearing representative, who had an opportunity to observe appellant's demeanor, did not find his testimony credible. Considering the maps of the area in relationship to his home and his post of duty, the hearing representative did find credible the employing establishment's contention that appellant had deviated on the route to his home when the incident occurred. The Board has no reason to overturn the hearing representative's judgment on this point.

Appellant testified that he did not know why he did not take the Commerce Street exit off I-35E north: "I don't know. Just because I drive very slow, I missed the Commerce and I left the other one [the McKinney exit off 75]." He then tried to establish that when traveling north on I-35E "you take 75 exit to McKinney to go downtown." The hearing representative, who was familiar with the area, pressed appellant on this point. He stated: "I don't know really that day, maybe I'm going to take -- because I went to take lunch before I go to downtown so it's not big deal really. It's not...."

This raises a discrepancy in the element of activity. Appellant informed his supervisor on October 5, 2006 that he was returning to his post of duty when the October 3, 2006 accident occurred. On November 3, 2006 he stated that he was driving back to the downtown office to check his e-mail. Appellant stated this again in his June 1, 2007 testimony before the Office

[6] *Carmen Dickerson*, 36 ECAB 409 (1985); *Joseph A. Fournier*, 35 ECAB 1175 (1984); *see also George W. Glavis*, 5 ECAB 363 (1953).

[7] If appellant missed the Commerce Street exit on I-35E north, he could have taken Exit 429B to Continental Avenue and Lamar Street. But that exit does not fit appellant's description of a ramp to US 75.

hearing representative. But when it became clear that the location of the accident was not consistent with a direct return to his post of duty, he changed his story. Appellant explained for the first time that he was where he was at the time of the accident because he was going to take lunch at McDonald's before he went downtown. This is simply not credible. The police incident report shows that the accident occurred about 10:25 a.m., some 35 minutes before appellant's lunch break began. The Board also takes notice that there is a McDonald's at 1000 Commerce Street, just one block from appellant's post of duty. These facts belie his late story for not traveling on a reasonably direct route from the audit site to his downtown office.

In addition to the questions that have arisen as to the time, place and activity elements of work connection, there is a question regarding notification of the accident. Appellant testified that he promptly notified his secretary of the accident on October 3, 2006, though he was uncertain whether he spoke to her directly or left a message. His supervisor disputes this. She stated that he called the secretary on October 3, 2006 to request four hours of annual leave but failed to notify her of any accident. The supervisor spoke to the secretary, who advised that she first learned of the accident three days after the fact. Appellant did not notify his supervisor for two days. Failure to provide prompt notification raises a question as to the validity of appellant's claim that he sustained an employment injury as alleged.

The Board finds that appellant has not met his burden of proof. There are too many questions and inconsistencies to find that appellant sustained an injury in the course of employment on October 3, 2006. The Board affirmed the Office decisions denying compensation benefits.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that he sustained an injury in the course of employment on October 3, 2006.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2007 and November 28, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 2, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board